United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2041

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CIVIL ACTION NO. 76-2041

LOUIS COFONE

Plaintiff-Appellant

v.

JOHN MANSON, Commissioner of Corrections, et al

Defendants-Appellees

On Appeal from the United States District Court

for the District of Connecticut

B

BRIEF OF APPELLEES

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I N D E X

TABLE OF CITATIONS

RELEVANT STATUTES

Section 18-91, Connecticut General Statutes

STATEMENT OF ISSUES

1. Is this appeal now moot because of the transfer of the appellant to the United States Correctional Institution in Atlanta, Georgia?

2. Did the District Court err in dismissing the appellant's challenge to the constitutionality of regulations of the Connecticut Department of Correction which authorized the warden of the Connecticut Correctional Institution, Somers, to read a prisoner's non-privileged mail?

STATEMENT OF THE CASE

This is an appeal from a judgment of the United States District Court for the State of Connecticut (Judge M. Joseph Blumenfeld) which judgment was filed on May 14, 1976.

The decision of the District Court in Cofone v. Manson, et al, is reported in 409 F.Supp. 1033 (D. Conn. 1976).

The appellant-plaintiff was, at the time judgment entered, a prisoner confined in the Connecticut Correctional Institution, Somers. As will be discussed below, the appellant was transferred to the United States Correctional Facility in Atlanta, Georgia on October 12, 1976.

The appellees-defendants are the Connecticut Commissioner of Correction, the Warden and an Assistant Warden at Somers.

In part, the judgment of the District Court sustained the appellant's challenges to various rules and procedures of the Connecticut Department of Correction pertaining to the rejection of publications to inmates. No appeal was taken from this portion of the judgment.

The remaining portion of the judgment and the only portion upon which an appeal was taken rejected and dismissed the appellant's attack upon the constitutionality of Correctional Department regulations which authorize the Warden to single out an individual prisoner under certain conditions discussed below for a review of his non-privileged mail.

"Privileged mail is that sent by attorneys, courts and governmental officials." (See: Cofone v. Manson, supra, p. 1042, note 24) This definition of privileged mail is concurred in by the appellant. (See: Appellant's Brief, p. 4, note 2).

The judgment of the District Court is contained in the Appellee's Appendix at p. 4 and p. 5.

I. THE TRANSFER OF THE APPELLANT TO A UNITED STATES CORRECTIONAL INSTITUTION MAY RENDER THIS APPEAL MOOT

On October 12, 1976, the appellant was transferred to the United States Correctional Institution in Atlanta, Georgia. This transfer was effected under the provisions of Section 18-91, Connecticut General Statutes. This statute provides, in part, that:

> "The commissioner may enter into and execute a contract or contracts with the United States for the removal of any inmate from any institution of the department to a federal correctional institution or medical center when, in his opinion, the inmate needs particular treatment or special facilities available at such correctional institution or medical center, or it is in the best interest of the state."

In Weinstein v. Bradford, ____U.S.____ 96 S.Ct. 347, 349 (1975) the Court, in dismissing as moot, held that:

> "Sosna decided that in the absence of a class action, the 'capable of repetition, yet evading review' doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again."

In view of the fact that this appeal deals with regulations applicable in a correctional institution in which the appellant is no longer confined it is difficult to see what relief this Court can give him.

The appellees do note, however, that although they have no present or even foreseeable intention of returning the appellant to a Connecticut Correctional Institution that they obviously cannot compel the United States Bureau of Prisons to retain the appellant and the Bureau could insist upon his return. Further, the appellant has instituted an action in the United States District Court for the District of Connecticut (Cofone v. Manson, et Civil No. H-76-398), challenging this transfer. The trial in this action is scheduled for November 15, 1976, before Judge Blumenfeld.

II. THE APPELLANT'S CLAIM ON THE MERITS

A. THE REASONS FOR REVIEW OF APPELLANT'S MAIL

A regulation of the Connecticut Department of Correction provides that:

> "(a) Under exceptional circumstances the review of both incoming and outgoing mail may be authorized in writing by the warden. Authorization to review mail may be given on a finding by the warden that there are indications creating a reasonable belief that: 1. Correspondence concerns sending contraband in or out of the institution or contains contraband. 2. Correspondence concerns plans to escape. 3. Correspondence concerns plans for activities in violation of institutional rules. 4. Correspondence concerns plans for criminal activity to be conducted within the institution. 5. Correspondence itself is in violation of institutional rules. 6. Correspondence contains material which would cause emotional trauma to the inmate or provide some suggestion of inmate emotional state as a potential suicide case.
> (b) The authorization to review mail shall be in writing by the warden and shall state:

1. The name of the inmate whose mail, both incoming and outgoing, may be reviewed.
2. The reason/s upon which the approval is based.
3. The time period for which review is approved. Authorization to review mail may extend for a period not to exceed 60 days, renewable only upon written application to the Commissioner of Correction.

(c) On the last day of each month, each warden will provide the Commissioner of Correction with a list of names of those inmates whose mail is under review."
(See: Cofone v. Manson, supra, p. 1042-1043, note 25.)

From August 29, 1974, to December 18, 1974, and from May 27, 1975, through at least August 14, 1975, the appellant's non-privileged mail was read upon authorization from Warden Robinson.

The mail read did not include mail to or from attorneys, courts or governmental officials. Cofone v. Manson, supra, p. 1042, note 24 and appellant's brief, p. 4, note 2.

The reason for the first review was that the Warden had information "...to the effect that there were still strong efforts to organize groups within the institution and as a result those types of groups could have been disruptive, which could have affected the safety of not only staff but members of the inmate population." (Testimony of Warden Robinson, T. p. 68)

The reason for the second review was that the Warden "...received strong information, which was followed up by an investigation, that there was a planned escape, assault, taking of correctional staff hostage with the escape from the institution." (Testimony of Warden Robinson, T. p. 61).

The regulations of the Department of Correction authorizes the review of non-privileged or so-called "social" mail "...on a finding by the warden that

there are indications creating a reasonable belief that:

> "2. Correspondence concerns plans to escape.
> 3. Correspondence concerns plans for activities in violation of institutional rules.
> 4. Correspondence concerns plans for criminal activity to be conducted within the institution."
> Cofone v. Manson, supra, p. 1043, note 25.

On pages 17 through 19 of the appellant's brief he challenges sections 1 and 6 of the review regulation which authorize the reading of social correspondence when the Warden has a reasonable belief, that such mail concerns contraband or contains material which would cause "emotional trauma" to an inmate.

Since neither of these reasons were relied upon to warrant the reading of the appellant's mail and they were not challenged in the District Court, it seems clear that the appellant has no standing to seek their review in this Court.

B. THE REVIEW OF THE APPELLANT'S MAIL DID NOT DEPRIVE HIM OF ANY CONSTITUTIONAL RIGHT

In Lanza v. State of New York, 370 U.S. 139, 142, 82 S.Ct. 1218, 1221, 8 L.Ed.2d 384 (1962), the Court held that:

> "...it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day."

The regulation challenged applied to the appellant as an inmate of a maximum security prison. His criminal record includes convictions and sentence for First Degree Murder, Rape, Aggravated Assault, Inciting Injury to Persons

or Property and Escape (Testimony of Warden Robinson, T. p. 62).

While the appellees do not suggest that even with this record the appellant has lost all of his rights under the Constitution "The 'normal activity' to which a prison is committed—the involuntary confinement and isolation of large numbers of people, some of whom have demonstrated a capacity for violence—necessarily requires that considerable attention be devoted to the maintenance of security." Pell v. Procunier, 417 U.S. 817, 826-827, 94 S.Ct. 2800, 2806 (1974).

In characterizing a prison, this court has held that:

> "As one court has observed: 'The association between men in correction institutions is closer and more fraught with physical danger and psychological pressures than is almost any other kind of association between human beings. Edwards v. Sard, 250 F.Supp. 977, 981 D.D.C. 1966)."
> Sostre v. McGinnis, 442 F.2d 178, 197 (2nd Cir. 1971) cert. denied sub. nom.
> Oswald v. Sostre, 405 U.S. 978, 92 S.Ct. 1190, 31 L.Ed.2d 254 (1972).

Further, in Sostre, supra, at p. 201 this Court held that "...we necessarily rule that prison officials may open and read all outgoing and incoming correspondence to and from prisoners."

At least insofar as reading non-privileged mail is concerned, the result in Sostre was clearly concurred in by the Supreme Court in Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed. 935 (1974).

With regard to mail from an attorney the Court held in Wolff that "...we think that petitioners, by acceding to a rule whereby the inmate is present when mail from attorneys is inspected, has done all, and perhaps even more, than the Constitution requires." Wolff v. McDonnell, 418 U.S. 539, 577, 94 S.Ct. 2963, 2985, 41 L.Ed.2d 935 (1974).

However, the Court further held with regard to non-attorney mail such as is involved in this case that:

> "While First Amendment rights of correspondents with prisoners may protect against the censoring of inmate mail, when not necessary to protect legitimate governmental interests, see Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974), this Court has not yet recognized First Amendment rights of prisoners in this context, cf. Cruz v. Beto supra; Cooper v. Pate,[1] supra. Furthermore, freedom from censorship is not equivalent to freedom from inspection or perusal. As to the Sixth Amendment, its reach is only to protect the attorney-client relationship from instrusion in the criminal setting, see Black v. United States, 385 U.S. 26, 87 S.Ct. 190, 17 L.Ed.2d 26 (1966); O'Brien v. United States, 386 U.S. 345, 87 S.Ct. 1158, 18 L.Ed.2d 94 (1967); see also Coplon v. United States, 89 U.S. App.D.C. 103, 191 F.2d 749 (1951), while the claim here would insulate all mail from inspection, whether related to civil or criminal matters."
> Wolff v. McDonnell, 418 U.S. 539, 575-576, 94 S.Ct.2963, 2984 (1974). (Underlining added)

In this regard it should be noted that there is no claim in this case that the appellant's mail is censored in the sense that portions are deleted or that any of his mail was not delivered. His mail was simply read.

In Wolff the Court held that such mail was subject to "perusal". The word "peruse" has been defined to mean "to examine or consider or survey with some attention and typically for the purpose of discovering or noting one or more specific points." (Webster's Third New International Dictionary). This definition clearly authorizes the review of the appellant's mail.

[1] Cruz v. Beto, 405 U.S. 319, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972). Cooper v. Pate, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed.2d 1030 (1964).

C. CONTRARY TO THE APPELLANT'S CLAIM, PROCUNIER v. MARTINEZ CLEARLY AUTHORIZES THE REGULATION CHALLENGED

The appellant repeatedly relies upon Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974), in support of his challenge to the review of his mail.

The appellees claims that Procunier authorizes this regulation.

Procunier dealt with the censorship of an inmates mail and held that to justify such censorship:

> "First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." Procunier v. Martinez, 416 U.S. at 413, 94 S.Ct. at 1811.

Certainly, the reading of the appellant's mail for the purpose of guarding against escape, the taking of hostages, injury to staff or other inmates or disrupting the prison, furthers a "substantial governmental interest" and under Procunier would justify even censorship.

The significant point is that the appellant's mail was not "censored". His mail was read.

In Procunier, the Court further held that:

> "Perhaps the most obvious example of justifiable censorship of prisoner mail would be refusal to send or deliver letters concerning escaped plans or containing other information concerning proposed criminal activity, whether within or without the prison." Ibid.

The Court clearly must have intended that mail could be read other there would be no way of knowing whether its contents were such so as to warrant a refusal to deliver or to send.

This was so held in Frazier v. Donelon, 381 F.Supp. 911, 918 (E.D. Louisiana)[2] where the Court noted:

> "Implicit in the Court's above discussion regarding the censorship of inmate correspondence is the entitlement of jail authorities to open and read most incoming and outgoing inmate mail."
>
> See Also: Toffey v. Hills, Civil No. B-75-195 (D. Conn. 1975) pp. 1-3 of Appellees Appendix.

D. THE APPELLANT'S REMAINING CLAIMS

The appellant claims that if his mail is to be read, then it should be read in his presence (Appellant's Brief, p. 20).

This claim concedes that such mail can be read. Further, it is impossible to see what benefit such a procedure would be to the appellant. Such a procedure would simply be a burden to the staff of the institution.

The appellant lastly claims that he and his correspondents are entitled to be notified when such review commences and given an opportunity to contest the decision.

The giving of notice would obviously eliminate the effectiveness of the review. Further, this appellant did know that his mail was being reviewed.

The District Court correctly rejected the appellant's claims with regard to a hearing by noting:

[2]Aff'd. 520 F.2d 941 (5th Cir. 1975), U.S. cert. den. 96 S.Ct. 1134 (1976).

> "Since the plaintiff has no expectation of privacy, Sostre v. McGinnis, and since the state regulation provides notice of the prison officials' right to open the mail, the plaintiff has failed to state a due process claim. Before any substantial disciplinary action can be taken against a prisoner based on information obtained in a mail screen, he will have the normal right to a due process hearing. Sostre, 442 F.2d at 203."
> Cofone v. Manson, supra, at p. 1043.

III. THE APPELLANT DOES NOT HAVE A RIGHT TO PRIVACY IN HIS NON-PRIVILEGED MAIL

In Christman v. Skinner, 468 F.2d 723, 726 (2 Cir. 1972), this Court, relying on Lanza v. New York, supra, rejected an inmate's claim that his right of privacy was violated because of the monitoring of his conversations with visitors. It certainly would seem that since prison officials can monitor visits then they can read an inmate's mail.

Lastly, "Protection of privacy does not extend to the inmates of a prison confined there after a due process determination that they have violated criminal laws. Conviction of crime carries not only loss of liberty, but also other impairments associated with membership in a closely supervised prison community." Paka v. Manson, 387 F.Supp. 111, 122 (D. Conn. 1974).

C O N C L U S I O N

In view of the foregoing, it is respectfully claimed that the judgment of the District Court should be affirmed and that this appeal be dismissed.

D E F E N D A N T S - A P P E L L E E S

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C E R T I F I C A T I O N

A copy of the foregoing has been served by mail, postage prepaid, on Martha Stone, Esq., Georgetown Legal Intern Program, 412 Fifth Street, N.W., Washington, D.C. 20001, this 5th day of November, 1976.

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